Filed 4/10/15 Harty v. Chevron CA

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

GERARD HARTY, Plaintiff and Appellant, v. CHEVRON CORPORATION, et al., Defendants and Appellants.	A138608 (Contra Costa County Super. Ct. No. MSC11-01143)

Gerard Harty, a resident of Australia, managed a warehouse in China owned by a joint venture in which Chevron U.S.A., Inc. (Chevron) participated. Harty was the employee of Swift Technical Group Limited (Swift), a British corporation retained by Chevron to provide technical services. He was injured when he fell from a ladder in the warehouse and he sued Chevron, which moved for summary judgment on the ground that it owed no duty to Harty because (1) it had not affirmatively contributed to Harty's injury and had no knowledge of a dangerous condition in the warehouse that caused the injury, relying on a line of California Supreme Court decisions beginning with *Privette v. Superior Court* (1993) 5 Cal.4th 689 (*Privette*); (2) Harty's injury was unforeseeable; and (3) the dangerous condition in the warehouse that contributed to the injury was obvious.

The trial court granted Chevron's motion, agreeing with Chevron's second and third arguments, but rejecting Chevron's argument that the *Privette* line of cases governed this case. The court included *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198 (*Hooker*) as one of the *Privette* line of cases it regarded as inapplicable.

On appeal, Harty contends the court erred in finding his injury was unforeseeable and the condition contributing to his fall was obvious. Because we review de novo a trial court's ruling on a motion for summary judgment, we affirm on other grounds that do not require us to reach Harty's assertions of error.

Chevron has also cross-appealed, challenging the trial court's rejection of its theory that the *Privette* line of cases governs this case. We agree with Chevron to a limited extent—while *Hooker* was decided with consideration of the *Privette* line of cases, it does govern in this case.

BACKGROUND

Because this appeal arises from the grant of a motion for summary judgment, "[w]e view the evidence in the light most favorable to [Harty] as the part[y] opposing summary judgment, strictly scrutinizing [Chevron's] evidence in order to resolve any evidentiary doubts or ambiguities in [Harty's] favor." (*Dammann v. Golden Gate Bridge, Highway & Transportation Dist.* (2012) 212 Cal.App.4th 335, 340-341.)

Chevron, along with PetroChina, is part of a joint venture known as Chuandongbei Gas Project (project) in Sichuan Province of China. As part of the project, which began in 2008, Chevron needed to establish warehouses to supply materials for drilling and other engineering personnel. Accordingly, Chevron sought to retain the services of experts in warehouse operations. Chevron obtained these experts through Swift, which Chevron had retained for the provision of technical services in 2005.[1] The agreement with Swift contemplated that Chevron would issue service orders for various Swift services and personnel that would be subject to the terms of the agreement. The warehouse supervisors engaged by Chevron were employees of Swift, not of Chevron.

[1] The 2005 agreement between Chevron and Swift was superseded by a 2009 agreement.

Harty was hired by Swift in July 2008, and Chevron assigned him to work at Warehouse No. 9 (the warehouse) in Nanba, China.[2] He would work in China for 28 days and then have 28 days off. During Harty's time off, another Swift employee known as Harty's "back-to-back," Greg Doohan, supervised the warehouse. Before his engagement by Swift, Harty had 22 years of warehouse experience. He had supervised and directed other individuals in many of his assignments and managed and controlled inventories wherever he worked.

It was Harty's understanding that worker safety was a top priority for Chevron. Chevron gave a "safety brief" to the warehouse workers, whom Harty supervised, every morning.[3] When Harty observed unsafe conditions, he reported them to Chevron. Chevron documented that all personnel had been properly trained on safe work practices. Harty made recommendations to Chevron concerning processes and procedures. Chevron used the input of the experts it retained to produce a series of "Warehouse Safe Work Practices" manuals covering topics such as "Palletizing," "Pipe Loading, Unloading and Storage," "General Warehouse Operations and Material Handling," "Safe Forklift Operations," "Chemical Handling and Storage," and "Lifting and Rigging Standards."[4] Chevron's health, environment and safety team in China was responsible "to make sure that everybody's doing the best they can to work safe." Members of the team "walked the warehouses" and performed inspections.

On November 30, 2009, Harty was conducting an inventory of items stored on shelves in the warehouse. The shelves were about eight feet wide, sufficient to hold two

---

[2] The initial service order for Harty's services was for the period from July 15, 2008, to May 31, 2009. A second service order was executed in May 2009, for the period from June 1, 2009, to May 31, 2010.

[3] The status of those whom Harty supervised is unclear from the record. They were neither Chevron's nor Swift's employees. Harty referred to them as working for "SPS," but there is no indication of SPS's relationship to Chevron, Swift or the project.

[4] These documents were still in draft form at the time of Harty's accident and had not yet been implemented. However, a general safe work practices manual had been finalized and was published by Chevron prior to the accident.

pallets of material. Harty had positioned a ladder[5] against the shelves and was on the ladder so he could examine inventory tags. To read the inventory tags, he would have to lean around the ladder, no more than one or two feet. He was no more than three or four feet from the ground. Suddenly Harty fell from the ladder, landing on the cement floor, and badly injured his ankle. He heard and felt nothing prior to the fall and did not know what caused him to fall.

Wayne Cook, Chevron's health, environment and safety superintendant in China, arrived within minutes and later conducted an investigation into the accident. On the ground near Harty was a retaining bracket from the shelves. The purpose of a retaining bracket is to keep items from falling off the shelf; it does not contribute to the shelf's structural integrity. The bracket clips onto the shelving support a few inches above the level of a shelf. Once a bracket is clipped in, it will not simply fall off—an external force to lift or twist it would be required. A bracket can be locked in place with locking pins, but the bracket that fell was not secured with such pins. When the shelving was erected at some earlier time, under Doohan's supervision, locking pins had been in place on all brackets.

On the shelf from which the retaining bracket had fallen were pallets of slings. Whoever loaded the pallets onto the shelf would have had to remove the retaining bracket to load the pallets. After the pallets were loaded, the retaining bracket had been returned to the shelf, but either no locking pins were in place at the time or if they were, they were not reattached. Cook surmised that Harty had been leaning on the bracket and that as he reached for an inventory tag, "he had just enough torque" that the bracket "popped out." Harty's theory, as stated in his complaint, is that the bracket "became unfixed and fell onto the ladder," causing him to fall.

Harty had surgery on his injured ankle in Hong Kong and returned to Australia where he received additional treatment**,** including physical therapy, x-rays and surgery.

---

[5] In his deposition, Harty said he didn't know if the ladder was an extension ladder, but if it was, he had not extended the upper section, so he was on "the single section."

Harty was not billed for his medical expenses in Hong Kong (he believed that Chevron paid for them). Harty personally paid for his medical expenses in Australia. Swift or Swift's insurer reimbursed Harty for his initial expenses in Australia, but after Swift informed Harty in April 2010 that Chevron did not want him to return to China, reimbursement of medical expenses ceased. Harty estimated that he incurred about $8,000 in medical expenses that were never reimbursed. Swift provided Harty no wage replacement for the time that he was unable to work.

Harty filed suit against Chevron on May 17, 2011. His complaint stated two causes of action: negligence and premises liability. On November 9, 2012, Chevron filed a motion for summary judgment or, in the alternative, summary adjudication. Harty opposed the motion. The trial court issued a tentative ruling granting Chevron's motion for summary judgment, and a hearing was held on February 7, 2013. The court confirmed its tentative ruling and granted Chevron's motion. The court entered judgment in favor of Chevron on March 5, 2013.

Harty timely filed a notice of appeal on May 2, 2013. Chevron timely filed a notice of cross-appeal on May 21, 2013.

DISCUSSION

We review a grant of summary judgment de novo. (*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 253.) As we have already noted, we view the evidence in the light most favorable to Harty and resolve any evidentiary doubts or ambiguities in his favor.

"First, and generally, from commencement to conclusion, the party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law. That is because of the general principle that a party who seeks a court's action in his favor bears the burden of persuasion thereon. (See Evid. Code, § 500.) There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof. . . . A defendant [moving for summary judgment] bears the burden of persuasion

that 'one or more elements of' the 'cause of action' in question 'cannot be established,' or that 'there is a complete defense' thereto. [Citation.]

"Second, and generally, the party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact. . . . A prima facie showing is one that is sufficient to support the position of the party in question." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850-851, fn. omitted; see also Code Civ. Proc., § 437c, subd. (p).)

In analyzing a motion for summary judgment, both the trial court and the reviewing court follow a three-step process: " 'First, we identify the issues raised by the pleadings, since it is these allegations to which the motion must respond; secondly, we determine whether the moving party's showing has established facts which negate the opponent's claims and justify a judgment in movant's favor; when a summary judgment motion prima facie justifies a judgment, the third and final step is to determine whether the opposition demonstrates the existence of a triable, material factual issue.' " (*Waschek v. Department of Motor Vehicles* (1997) 59 Cal.App.4th 640, 644.)

Harty's complaint states two causes of action—negligence and premises liability. We examine each of these and conclude that for both Chevron met its burden of production, shifting the burden to Harty, who failed to meet his burden of production as to at least one essential element. Accordingly, we affirm the trial court's grant of Chevron's motion for summary judgment.

I. *There Was No Triable Issue Of Material Fact For The Required Showing That Chevron Affirmatively Contributed To Harty's Injury.*

Because Harty was employed by Swift, not Chevron, this case involves a question on which our Supreme Court has weighed in repeatedly over the last two-plus decades: the duty of care owed by a party who hires an independent contractor to employees of

that contractor.[6] (See *Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 664, 667-681 (*Kinsman*).)

A. *Legal Background: The* Privette *Line Of Cases*

In a series of cases dating back to 1993, the Supreme Court has grappled with (1) the common law norm that a party who delegates a task to an independent contractor effectively delegates the responsibility to perform that task safely, and shifts liability for any failure to do so to the contractor; and (2) a series of exceptions to that general rule developed by courts and set forth in the Restatement Second of Torts[7] (see Rest.2d Torts, § 409, com. b, pp. 370-371). As the Restatement authors observed, the exceptions have become "so numerous, and they have so far eroded the 'general rule,' that it can now be said to be 'general' only in the sense that it is applied where no good reason is found for departing from it." (Rest.2d Torts, § 409, com. b, p. 370.) In *Privette* and the cases that followed, the court began to reverse the trend recognized in the Restatement of applying exceptions to the general common law delegation rule, at least for purposes of California law governing workplace injuries.[8] Key to these decisions has been the conflict between the exceptions "as applied in favor of the contractor's employees, and the system of workers' compensation." (*Privette, supra,* 5 Cal.4th at p. 691; see *id.* at pp. 696-702.)

---

[6] At oral argument on appeal, Harty's counsel belatedly argued that we should regard Chevron as Harty's de facto employer. Although Harty stressed certain facts that might support such a proposition in his opposition to the motion for summary judgment, he nowhere argued that his position was other than that of an employee of an independent contractor engaged by Chevron. Nothing prevented Harty from making this new argument at an earlier point in these proceedings, so we do not consider it. (*Sea & Sage Audubon Society, Inc. v. Planning Com.* (1983) 34 Cal.3d 412, 417 [as a general rule, issues not raised in the trial court cannot be raised for the first time on appeal]; *Sunset Drive Corp. v. City of Redlands* (1999) 73 Cal.App.4th 215, 226 ["Absent a sufficient showing of justification for the failure to raise an issue in a timely fashion, we need not consider any issue which, although raised at oral argument, was not adequately raised in the briefs"].)

[7] All further references to "Restatement" are to the Restatement Second of Torts.

[8] These decisions address whether the common law rule and its exceptions continue to apply to independent contractors and their employees but do not address injured third parties not affiliated with an independent contractor.

In *Privette,* the court rejected the exception known as the "peculiar risk" doctrine (set forth in Rest.2d Torts, § 416), under which "a person who hires an independent contractor to perform work that is inherently dangerous can be held liable for tort damages when the contractor's negligent performance of the work causes injuries to others." (*Privette, supra,* 5 Cal.4th at p. 691.) It reasoned that the purpose of the exception, which created vicarious liability on the part of the landowner or hiring party (*id.* at p. 695), was "to ensure that innocent third parties injured by the negligence of an independent contractor hired by a landowner to do inherently dangerous work on the land would not have to depend on the contractor's solvency in order to receive compensation for the injuries." (*Id.* at p. 694.) However, with regard to employees of the independent contractor, "the workers' compensation system of recovery regardless of fault achieves the identical purposes that underlie recovery under the doctrine of peculiar risk. It ensures compensation for injury by providing swift and sure compensation to employees for any workplace injury; it spreads the risk created by the performance of dangerous work to those who contract for and thus benefit from such work, by including the cost of workers' compensation insurance in the price for the contracted work; and it encourages industrial safety." (*Id.* at p. 701.)

The court also observed that allowing employees of independent contractors to obtain tort recoveries from the hiring entity "produces the anomalous result that a nonnegligent person's [the hiring party's] liability for an injury is greater than that of the [independent contractor] whose negligence actually caused the injury." (*Privette, supra,* 5 Cal.4th at p. 698.) It would also "exempt a single class of employees, those who work for independent contractors, from the statutorily mandated limits of workers' compensation." (*Id.* at p. 700.) And "to impose vicarious liability for tort damages on a person who hires an independent contractor for specialized work would penalize those individuals who hire experts to perform dangerous work rather than assigning such activity to their own inexperienced employees." (*Ibid.*) For all of these reasons, the court held that when an independent contractor's performance of work results in injury to its employee who is covered by workers' compensation, "the doctrine of peculiar risk

affords no basis for the employee to seek recovery of tort damages from the person who hired the contractor but did not cause the injuries." (*Id.* at p. 702.)

Following *Privette*, the Supreme Court rejected other exceptions to the general delegation rule that imposed vicarious liability. Thus, in *Toland v. Sunland Housing Group, Inc.* (1998) 18 Cal.4th 253, 269-270 (*Toland*), it rejected the "inherently dangerous work" exception of Restatement section 413 and declined to allow the employee of an independent contractor to recover from the hirer for work-related injuries. In *Camargo v. Tjaarda Dairy* (2001) 25 Cal.4th 1235, 1241-1245 (*Camargo*), it rejected the "negligent hiring" exception of Restatement section 411 as applied to the injured employee of an independent contractor.[9]

Most recently, in *SeaBright Ins. Co. v. US Airways, Inc.* (2011) 52 Cal.4th 590, 600-603, the court extended the general rule, revived in *Privette* and its progeny, allowing hirers to delegate workplace safety obligations to independent contractors, to cases involving statutory workplace safety requirements (there, Cal-OSHA regulations governing airline luggage conveyors (*id.* at p. 594)). The court disagreed with the Court of Appeal's holding that such statutory duties were nondelegable: "By hiring an independent contractor, the hirer implicitly delegates to the contractor any tort law duty it owes *to the contractor's employees* to ensure the safety of the specific workplace that is the subject of the contract," including the duty to comply with safety-related statutes and regulations. (*Ibid.*) As it had in *Privette* and the other cases described above, the court relied heavily on the fact that workers' compensation statutes ensure contractor's employees a remedy; that the hirer indirectly bears the cost of providing that remedy because the contract price it pays presumably includes the cost of workers' compensation insurance; that the risk and costs of performing dangerous work are thus spread to those

[9] Although a theory of negligent hiring asserts an act of direct negligence on the part of the hirer of the independent contractor, "the liability of the hirer is 'in essence "vicarious" or "derivative" in the sense that it derives from the "act or omission" of the hired contractor, because it is the hired contractor who caused the injury by failing to use reasonable care in performing the work.' " (*Camargo, supra,* 25 Cal.4th at p. 1244.)

who benefit from that work; and that it would be unfair to permit injured employees to obtain full tort damages from a hirer when they could not recover them from their employer who caused the injury. (*Id.* at p. 603.)

However, the Supreme Court has also made clear that the employee of an independent contractor, "despite the existence of the workers' compensation system, is not barred from suing a third party who proximately causes the employee's injury." (See Lab. Code § 3852.)" (*Hooker*, *supra*, 27 Cal.4th at p. 213.) Thus, in *Hooker*, at pages 206-214, the court preserved the "retained control" exception (Rest.2d Torts, § 414) that applies when a hirer retains control over safety conditions at the worksite, permitting its application when hirer's negligent exercise of its retained control affirmatively contributes to the contractor employee's injury. Similarly, in *Kinsman*, *supra*, 37 Cal.4th at pages 672-678, it held that a landowner who hires an independent contractor to work on its premises and fails to warn the latter of a concealed hazardous condition may be liable for injuries to the contractor's employees resulting from that condition if the contractor did not and could not reasonably know of the hazard. *Hooker* and *Kinsman* stand apart from the *Privette* line of cases because they *permit* the injured worker of an independent contractor to assert the liability of the hirer of the independent contractor in certain circumstances, without regard to whether the worker is covered by the workers' compensation system.

B. Hooker *Governs Harty's Negligence Claim And Requires That Chevron Affirmatively Contributed To Harty's Injury.*

Harty was the employee of Swift, an independent contractor that Chevron engaged to operate its warehouses. Harty's briefing makes clear that he depends on a theory of negligent exercise of retained control addressed in *Hooker* and stated in Restatement section 414: "One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable case, which is caused by his failure to exercise his control with reasonable care." Indeed, Harty specifically

invoked *Hooker* as the basis for his claim of negligence in his opposition to the motion for summary judgment.

The question before the Supreme Court in *Hooker* was whether the employee of an independent contractor could sue the hirer for the negligent exercise of retained control. (*Hooker*, *supra*, 27 Cal.4th at p. 201.) The court observed that there is a split among other states' courts on whether an employee of a contractor falls within the protection of the retained control exception. (*Id.* at pp. 206-208.) The court further observed that the California Courts of Appeal "have agreed that a hirer may, under certain circumstances, be liable to an employee of a contractor under a retained control theory," but "have disagreed as to whether mere retention of control is sufficient, or whether something more, something like the Utah Supreme Court's concept of *active participation*, must be shown." (*Id*. at pp. 208-09.) One division of this court had held that " 'the hirer may be held liable to the independent contractor's employee where the hirer retains sufficient control over the work of an independent contractor *to be able to* prevent or eliminate through the exercise of reasonable care the dangerous condition causing injury to the independent contractor's employee,' " whereas another division had held that imposing liability on the hirer required " 'evidence that the [hirer] affirmatively contributed to the employment of [the independent contractor's working] methods or procedures.' " (*Id*. at p. 209.)

The Supreme Court approved the latter, affirmative contribution, rule and rejected the more passive ability-to-prevent-the-dangerous-condition rule: "Imposing tort liability on a hirer of an independent contractor when the hirer's conduct has affirmatively contributed to the injuries of the contractor's employee is consistent with the rationale of our decisions in *Privette*, *Toland* and *Camargo* because the liability of the hirer in such a case is *not* ' "in essence 'vicarious' or 'derivative' in the sense that it derives from the 'act or omission' of the hired contractor." ' " (*Hooker*, *supra*, 27 Cal.4th at pp. 211-212, fn. omitted.) Thus, the court fashioned a standard for the negligent exercise of retained control that is consistent with the *Privette* line of cases but does not depend on them. *Hooker* lies outside the *Privette* line of cases—it discusses a theory of direct, not

vicarious, liability and does not assume that the injured worker is covered by workers' compensation.

Hooker establishes that to prevail on a retained control theory in California a contractor-employee plaintiff must demonstrate that the hirer-defendant affirmatively contributed to the plaintiff's injuries. In his opposition to the motion for summary judgment, Harty invoked *Hooker* as the governing standard, and on appeal he argues that whether Chevron affirmatively contributed to his accident is a triable issue of fact. We disagree with the trial court's conclusion that *Hooker* applies only in cases where the plaintiff is covered by workers' compensation and that a different retained control theory applies where there is no such coverage, and we agree with the parties here that *Hooker* controls this case.[10]

C. *Chevron Met Its Burden Of Production With Evidence That It Did Not Affirmatively Contribute To Harty's Injury, Shifting The Burden To Harty, Who Failed To Satisfy That Burden.*

With its motion for summary judgment, Chevron submitted portions of Harty's deposition testimony. Harty admitted that he had "overall responsibility for the operations" at the warehouse. The order for Harty's services specified that he would "[m]anage . . . warehousing operations," and Harty agreed that this was part of his responsibility. Although Harty received daily direction concerning his work, it was "simply with regard to what materials would be needed that day." Chevron "never gave [Harty] instructions about the steps . . . to take or how . . . to go about accomplishing" the movement of materials. No Chevron employees worked in the warehouse, and Harty directed the work of the individuals from SPS who did work there.

Chevron also presented evidence that when the shelving was erected, under Doohan's (Swift's) supervision, locking pins were put in place on all of the shelves. Cook testified in his deposition that during warehouse operations, retaining brackets were removed in order to load items onto shelves, and then were replaced. The shelf from

[10] The record is less than clear on whether Harty was covered by some form of workers' compensation, but that question does not matter for purposes of this appeal.

which the retaining bracket fell held pallets of slings at the time of Harty's accident. This evidence gives rise to the inference that when the slings were loaded onto the shelves, either the locking pins were already missing due to prior warehouse operations or the worker who removed the retaining bracket to load the slings failed to replace the locking pins when he or she returned the retaining bracket to the shelf.

The facts that a Swift employee erected the shelving and that Swift employees—not Chevron—oversaw the SPS workers who loaded and unloaded equipment on the shelves tend to disprove that Chevron did anything that affirmatively contributed to Harty's injury. The locking pins on the retaining bracket were missing due to warehouse operations which took place under Swift's supervision, not Chevron's.

Harty argues that Chevron affirmatively contributed to his injury by failing to inspect the shelves for safety issues. In *Hooker*, the Supreme Court noted that "affirmative contribution need not always be in the form of actively directing a contractor or contractor's employee. There will be times when a hirer will be liable for its omissions. For example, if the hirer promises to undertake a particular safety measure, then the hirer's negligent failure to do so should result in liability if such negligence leads to an employee injury." (*Hooker*, *supra*, 27 Cal.4th at p. 212, fn. 3.) At oral argument on appeal, Harty maintained that Chevron had obligated itself to inspect the warehouse. However, Harty's citations to the record show only that Chevron had a right to inspect the warehouse, that Cook's team was often in the warehouse "to try to make sure that people are following the rules and procedures that they need to," and that Chevron could require the warehouse manager to perform inspections. We find no indication that Chevron promised Harty that it would perform certain inspections or otherwise caused him to rely on inspections by Chevron, much less that it agreed to inspect for locking pins. Accordingly, we conclude that Harty failed to meet his burden of production on the question of affirmative contribution.

Under *Hooker*, Harty was required to show both that Chevron (1) retained control[11] over the work done in the warehouse and (2) negligently exercised that retained control in a way that affirmatively contributed to his injury. Chevron met its burden of production on the question of affirmative contribution, shifting the burden of production to Harty, who failed to meet his burden. Accordingly, the question of affirmative contribution was not a triable issue of material fact and Harty cannot maintain his cause of action for negligence.

II. *There Was No Triable Issue Of Material Fact For The Knowledge Element Of Harty's Premises Liability Cause Of Action.*

In addition to Harty's cause of action for negligence (on the theory of negligent exercise of retained control), Harty asserted a cause of action for premises liability, contending that the missing locking pins presented a dangerous condition on Chevron's property—a condition that Chevron failed to correct and about which Chevron failed to warn him. "[T]he owner's actual or constructive knowledge of the dangerous condition is a key to establishing its liability." (*Ortega v. Kmart Corp.* (2001) 26 Cal.4th 1200, 1206; see CACI No. 1003.)

Chevron argued in its motion for summary judgment that it had neither knowledge nor reason to know of the missing locking pins. This argument was supported in Chevron's separate statement:[12] "In 17 years, Chevron's Health Environment and Safety ("HES") Superintendent had never before had any issue with locking pins not being installed in a retaining bracket." Chevron cited Cook's deposition testimony in support of that assertion:

---

[11] Because Harty's failure to present evidence that Chevron affirmatively contributed to his injury is dispositive, we need not address whether Chevron's retained control was a triable issue of material fact.

[12] A party moving for summary judgment or summary adjudication must support the motion with "a separate statement setting forth plainly and concisely all material facts which the moving party contends are undisputed. Each of the material facts stated shall be followed by a reference to the supporting evidence." (Code Civ. Proc., § 437c, subds. (b)(1), (f)(2).)

"Q. Proper locking pins in place on a shelf beam, is that something you were looking for?

"A. No.

"Q. Why not?

"A. The—that's getting down to a specialty that supervisors of a warehouse, they would know about general safe work practices. Would any of my team or myself pick that up before this incident? Probably not. [¶] . . . [¶]

"Q. Is there—part of looking for actual locking pins being installed, is that something absolutely, positively no ability to identify just looking at it? [¶]

"[A.]: Today, now that we know about the incident, it would be something that all of us would be looking for. In my past experience, I've actually never run into this type of issue before."

Cook's testimony demonstrates that Chevron did not know or have reason to know about the missing locking pins before Harty's accident. This satisfied Chevron's burden of production on the issue of Chevron's knowledge.

Harty presented evidence that Cook's team was often present in the warehouse. Cook testified that "part of my team's job is to try to make sure that everybody's doing the best they can to work safe. . . . [M]y team walked the warehouses here and there. . . . [I]t's just part of my team's function is to try to make sure that people are following the rules and procedures that they need to." Members of Cook's team performed "walk-around inspections," although no formal inspection records were kept. Cook further stated: "[D]id my team or myself as we walked around the warehouse, did we recognize a lot of safety features? Yes, we do." However, the mere presence, at times, of Cook and his team in the warehouse, without direct or circumstantial evidence demonstrating why the team did or should have noticed the missing locking pins did not satisfy Harty's burden of production on the issue of knowledge. In particular, Harty presented no evidence that Cook's team paid any particular attention to the shelving in the warehouse, much less to the locking pins that secured the brackets on the shelves.

Not only did Harty fail to satisfy his burden of production, his own deposition testimony supported Chevron's position that there was no reason, before Harty's accident, for Cook's team to have noticed missing locking pins—he testified that in his years of warehouse experience, he had never had occasion to notice locking pins missing from a bracket.

There was no triable issue of material fact concerning the knowledge element of Harty's cause of action for premises liability. We have already concluded that there was no triable issue of material fact concerning an essential element of Harty's cause of action for negligence (the element of affirmative contribution to Harty's injury). Accordingly, we affirm the trial court's order granting Chevron's motion for summary judgment.

DISPOSITION

The judgment of the trial court is affirmed. The parties will bear their own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(5).)

STEWART, J.

We concur.

RICHMAN, Acting P.J.

MILLER, J.